IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 4233 of 2004

For Approval and Signature:

HON'BLE MISS JUSTICE R.M.DOSHIT

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

K P SOLANKI

Versus

COLLECTOR, KUTCH DISTRICT

Appearance:

1. Special Civil Application No. 4233 of 2004

MR BA VAISHNAV for the Petitioner

MR DIPEN DESAI, AGP for the Respondent

CORAM : HON'BLE MISS JUSTICE R.M.DOSHIT

Date of decision: 18/01/2005

ORAL JUDGEMENT

The petitioner, a Peon under the respondent,

challenges the order dated 20th November, 2003 made by the District Collector, Kachchha in so far as the period of 453 days from 26th December, 2001 to 23rd March, 2003 spent by the petitioner under suspension has been treated as extraordinary leave without pay and the amount of subsistence allowance paid to the petitioner has been ordered to be recovered.

For the alleged act of misconduct, pending disciplinary proceeding, the petitioner was placed under suspension. The order of suspension was revoked by order dated 20th March, 2003. Subject to the punishment that may be imposed upon the petitioner the petitioner was reinstated in service. After holding due disciplinary proceeding, by order dated 20th November, 2003 made by the District Collector, Kachchha, the petitioner has been visited with punishment of withholding of one increment with future effect. The period of suspension has been, under Rule 152 of the Bombay Civil Services Rules (hereinafter referred to as "the Rules"), treated as extraordinary leave without pay and the amount of subsistence allowance paid to the petitioner has been ordered to be recovered. Feeling aggrieved, the petitioner has preferred the present petition under Article 226 of the Constitution of India.

Learned advocate Mr.Vaishnav has appeared for the petitioner and has submitted that the impugned order made in exercise of power conferred by Rule 152 of the Rules is contrary to the said Rule and has been made without the authority of law. He has submitted that Rule 152 of the Rules does not empower the disciplinary authority to treat the period spent under suspension as extraordinary leave without pay or to recover the amount of subsistence allowance paid to the delinquent Government servant.

The petition is contested by the learned AGP Mr.Desai. He has submitted that Note.2 below sub-rule (5) of Rule 152 empowers the disciplinary authority to convert the period of suspension into leave without pay. The guilt having been established against the petitioner, the impugned order has rightly been made by the respondent in exercise of the aforesaid power conferred upon the disciplinary authority.

I am unable to agree with Mr.Desai. Rule 152 of the Rules indeed enjoins the authority competent to order the reinstatement to consider and make a specific order regarding the pay and allowances to be paid to the Government servant for the period of his absence from duty (on account of dismissal, removal or suspension from

service and subsequent reinstatement in service). In the present case, as the petitioner was found guilty and has been punished for the guilt established against him, it is sub-rule (3) which shall be attracted. Sub-rules (2) and (3) of Rule 152 of the Rules read as under :

"(2) Where the authority mentioned in sub-rule (1) is of opinion that the Government servant has been fully exonerated or in the case of suspension that iw was wholly unjustified the government servant shall be given the full pay and allowances to which he would have been entitled had he not been dismissed, removed or suspended, as the case may be."

"(3) In other case, the Government servant shall be given such proportion of such pay and allowances as such competent authority may prescribe :"

Sub-rule (5) of Rule 152 of the Rules and the Note.2 under the said sub-rule read as under :

"(5) In case falling under clause (3) the period of absence from duty shall not be treated as a period spent on duty unless such competent authority specifically directs that it shall be so treated for any specified purpose."

"Note.2---Under this rule the authority competent to order the reinstatement can convert a period of absence from duty from the date of suspension, dismissal or removal, as the case may be, till the date of reinstatement into one of leave admissible under the rule. The period of such absence cannot, however, be converted into leave without pay, except in accordance with the conditions in Rule 752. Subsistence allowance paid under this rule should be adjusted or recovered from the Government servant when the period of suspension is converted into leave with or without pay.

The conversion of only a part of the period of suspension as leave is not permissible, if a competent authority decides to convert a period spent under suspension into one of leave, the entire period of suspension has to be converted into leave admissible under the rule."

The plain reading of the aforesaid Note.2 should necessarily mean that the competent authority is empowered to convert the period spent under suspension into leave without pay in accordance with the conditions in Rule 752 of the Rules. Rule 752 of the Rules empowers grant of extraordinary leave in special circumstances (1) when no other leave is by Rule admissible; and (2) when other leave being admissible, the Government servant concerned applies in writing for the grant of extraordinary leave. In the present case, admittedly the petitioner had not applied for conversion of the period spent under suspension to leave without pay.

In my opinion, the power conferred upon the competent authority to convert period spent under suspension into leave without pay can be invoked only in case the delinquent Government servant applies in writing to convert the period spent under suspension into leave without pay. In absence of a specific request by the delinquent Government servant the competent authority has no power or legal sanction to convert the period spent under suspension into leave without pay and to order recovery of the amount of subsistence allowance paid to the delinquent Government servant.

The impugned order made by the respondent in so far the period spent by the petitioner under suspension has been converted into extraordinary leave without pay and in so far the petitioner is called upon to refund the amount of subsistence allowance received by him, is without the authority of law.

The petition is allowed. The impugned order treating the period spent by the petitioner under suspension as extraordinary leave without pay and seeking recovery of the amount of subsistence allowance paid to the petitioner is quashed and set aside. The period spent by the petitioner under suspension shall be, for the purpose of Rule 152 of the Rules, treated as the period spent under suspension.

Rule is made absolute in the above terms. There shall be no order as to cost.

(Ms. R.M.Doshit, J.)

/sakkaf